

1994

Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-reservation in Minnesota

Catherine M. Ovsak

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Ovsak, Catherine M. (1994) "Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-reservation in Minnesota," *William Mitchell Law Review*: Vol. 20: Iss. 4, Article 8.
Available at: <http://open.mitchellhamline.edu/wmlr/vol20/iss4/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

REAFFIRMING THE GUARANTEE: INDIAN TREATY RIGHTS TO HUNT AND FISH OFF-RESERVATION IN MINNESOTA

I. INTRODUCTION	802
II. BACKGROUND ON INDIAN TREATIES	803
A. <i>Origins</i>	803
B. <i>Statutory Canons</i>	805
III. REGULATION OF TREATY RIGHTS	808
A. <i>Federal Regulation</i>	808
1. <i>Regulations Limiting Treaty Rights</i>	808
2. <i>Regulations Protecting Treaty Rights</i>	809
B. <i>Tribal Regulation</i>	811
1. <i>Origin and Extent of Regulation</i>	811
2. <i>Recognition of Tribal Sovereignty</i>	813
C. <i>State Regulation</i>	814
1. <i>Origin</i>	814
2. <i>Limits on State Regulation</i>	815
IV. A BRIEF REVIEW OF THE EVOLUTION OF FEDERAL INDIAN POLICY	817
A. <i>Indian Reorganization Act of 1934</i>	817
B. <i>Termination</i>	817
C. <i>Indian Civil Rights Act of 1968</i>	819
V. THE CHIPPEWA TREATIES AND THE PRESIDENTIAL REMOVAL ORDER OF 1850	820
A. <i>Treaty of 1837</i>	820
B. <i>Treaty of 1842</i>	821
C. <i>Removal Order of 1850</i>	822
D. <i>Treaty of 1854</i>	823
E. <i>Treaty of 1855</i>	823
F. <i>Judicial Interpretation of Rights Granted Under the Chippewa Treaties</i>	824
VI. CURRENT CONTROVERSY OVER THE TREATY OF 1837	825
VII. THE INITIAL ARGUMENTS ON TERMINATION OF THE BAND'S RIGHTS AND AN ANALYSIS OF THEIR VIABILITY	828
A. <i>Termination by Reason of 1850 Removal Order</i>	828
B. <i>Termination by Reason of 1855 Treaty</i>	829
C. <i>Abrogation by Reason of Federal Indian Policy</i>	830
D. <i>Termination for Conservation Purposes</i>	831
VIII. RECENT COURT HOLDING	832
A. <i>Background</i>	832
B. <i>Existence of the 1837 Privilege</i>	833
C. <i>No Extension of the Privilege to Private Land</i>	835
D. <i>General Nature of the Treaty Rights</i>	835
E. <i>Denial of Interlocutory Appeal</i>	836

IX. CONCLUSION 836

I. INTRODUCTION

For motives including racism, greed, and scarcity of resources,¹ the validity of Indian treaties is being challenged on grounds that the treaties have become enervated by age and circumstance and should be abrogated for the ostensible benefit of both Indian and non-Indian citizens.² As a consequence of a legislative stalemate in Minnesota,³ the Mille Lacs Band of Chippewa Indians ("Band") and the State of Minnesota ("State") went to trial in May 1994 over rights reserved by the Chippewa Indians in a treaty made with the United States government in 1837.

The court was petitioned to determine whether the rights granted in the Treaty of 1837 were ever terminated and whether the State could enforce state regulations prohibiting netting and spearing of fish⁴ on the territory ceded in the 1837 treaty against band members.⁵ The court ultimately held that these rights had not been terminated and reserved the issue of the validity of the State's regulatory efforts for Phase II of the trial.⁶ This Comment focuses on the initial arguments presented for interpreting the hunting, fishing, and gathering rights reserved in the 1837 treaty and on the court's decision to uphold the Band's treaty rights.

Part II of this Comment provides a background on Indian treaties and the special canons of construction used by courts to interpret these treaties. Part III explores the separation of treaty regulation among the federal government, tribal nations, and state governments. Part IV presents a brief overview of the evolution of Federal Indian

1. "[L]egislators have been hearing grumbling from constituents about how the Indians already 'have enough' with their prosperous casinos. Those constituents sent the message that they'd rather lose in a court fight than 'give away' anything to the Indians." Robert Whereatt, *Victimized by Politics; Divided Leadership in Legislature Helped Doom Mille Lacs Treaty Bill*, STARTRIB. (Mpls.) May 9, 1993, at 1B. The chief Minnesota House sponsor of the Mille Lacs treaty bill, Representative David Battaglia (DFL-Two Harbors), said "some [House] members told him they had taken a politically tough vote earlier in the [1993] session in approving the bill that extended human rights protection to gays and lesbians. They were not about to take a second such vote." That amounts to racism, according to Battaglia. *Id.*

2. KIRKE KICKINGBIRD ET AL., INDIAN TREATIES 6 (1980) (citing the Native American Equal Opportunities Act of 1977, H.R. 1054, 95th Cong., 1st Sess. (1977)).

3. See *infra* part VI.

4. Treaty with the Chippewa, July 29, 1837, U.S.-Chippewa, 7 Stat. 536, reprinted in INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, TREATIES & AGREEMENTS OF THE CHIPPEWA INDIANS, 67-69 (1974) ("1837 Treaty").

5. See MINN. STAT. §§ 97C.325 (1992) (prohibiting fishing with nets); 97C.371 (1992) (restricting spear fishing).

6. Mille Lacs Band of Chippewa v. Minnesota, — F. Supp. —, —, Civ. No. 4-90-605, 1994 U.S. Dist. LEXIS 11901 *1, *64 (D. Minn. Aug. 24, 1994).

policy, and Part V presents background on the treaties of 1837, 1842, 1854, and 1855 between the Chippewa tribes and the federal government. Part VI describes the dispute between the Band and the State. Part VII analyzes the viability of the primary arguments presented by the parties and concludes that the court should find that the hunting, fishing, and gathering rights guaranteed in the treaty of 1837 were never terminated and that the regulations the State seeks to enforce are both discriminatory and unnecessary for conservation purposes. Part VIII summarizes the trial court's recent holding in this case. This Comment then concludes with a brief discussion of the implications of the court's determination that these treaty rights have not been terminated.

II. BACKGROUND ON INDIAN TREATIES

A. *Origins*

Treaties between Indian tribes and the federal government are considered contracts between two sovereign nations⁷ and are equal in force to treaties between the federal government and foreign nations.⁸ Treaties between the United States and Indian tribes⁹ constitute an important recognition and guarantee of Indian rights.¹⁰ These treaties envision a "measured separatism"¹¹ for an important minority¹² of

7. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

8. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 63 (1831).

9. The Supreme Court concluded long ago that the Constitution recognizes the ability of the United States and the Indian nations to enter into treaties. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558–60 (1832) (concluding that acts of the Georgia Legislature interfered with the relations established between the United States and the Cherokee nation).

10. See *United States v. Winans*, 198 U.S. 371, 381 (1905) (stating a "treaty [is] not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted").

11. See *Worcester*, 31 U.S. (6 Pet.) at 556–57 (discussing notion of separatism). Indian treaties cover a wide range of subjects, including trade, extradition, war and peace, political sovereignty, territorial boundaries, hunting and fishing rights, relations with other countries, and general assistance benefits. See generally FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 38–46 (1942); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?*, 63 CALIF. L. REV. 601, 602–12 (1975). Rights such as land occupancy are necessary for maintaining Indian culture and cannot be truly compensated for with money. *Id.* at 604–07.

12. The 1990 census reported approximately 2 million Indians living in the United States. See UNITED STATES DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*, Table No. 12 (1993). Roughly one-half of the Indian population lives on-reservation. See DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* § 110, at 7 (2d ed. 1986). However, despite their relatively small numbers, Indian tribes have managed to retain control over substantial land, energy, and mineral resources. *Id.* at 13, 614.

society that seeks to maintain a distinct identity and status as a separate nation.¹³

Generally, the United States entered into treaties with Indian tribes to end wars and acquire land.¹⁴ At the same time, tribal governments used treaties to confirm and retain rights such as the sovereign right of self-government, fishing and hunting rights, and jurisdictional rights over their own lands.¹⁵

The treaties typically consist of an agreement by several Indian tribes to relinquish their rights to vast amounts of aboriginal lands in exchange for money, retained hunting and fishing rights, and confinement to a reservation.¹⁶ The reservation system sought to minimize confrontations between settlers and the tribes.¹⁷ In addition, the United States government intended to use the reservation system as a means of transforming Indians into "a pastoral and civilized people."¹⁸

"Under the [S]upremacy [C]lause of the United States Constitution,^[19] Indian treaty provisions supersede conflicting state laws or state constitutional provisions"²⁰ and can only be abrogated by Congress with specific evidence of Congressional intent to do so.²¹ The validity of Indian treaties has long been upheld, despite attempts to

13. See VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 4-5 (1974); see also GETCHES, *supra* note 12, at 18-20.

14. KICKINGBIRD, *supra* note 2, at 2.

15. *Id.*

16. Bradley I. Nye, *Where Do The Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175, 178 (1992) (citing Robert M. Kvasnicka, *United States Indian Treaties and Agreements*, in 4 HANDBOOK OF NORTH AMERICAN INDIANS 195 (Washburn ed. 1988)).

17. *Id.*

18. *Id.* (citing *Winters v. United States*, 207 U.S. 564, 576 (1908)).

19. Article 6 of the Constitution provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

20. Nye, *supra* note 16, at 178 (citing *State v. Arthur*, 261 P.2d. 135, 141 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954)). See, e.g., *Antoine v. Washington*, 420 U.S. 194, 204 (1975) (noting that Supremacy Clause precludes application of state game laws in conflict with federal statutes ratifying agreements between the Executive Branch and Indian tribes); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876), *appeal after remand*, 108 U.S. 491 (1883) (prohibiting the introduction and sale of spirituous liquors in Indian country); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-60 (1832) (stating that Congress has the "sole and exclusive right" to regulate trade with Indian tribes).

21. See, e.g., *United States v. Dion*, 476 U.S. 734, 738 (1986) (finding that the Supreme Court has required that "Congress's intention to abrogate Indian treaty rights be clear and plain"). The loss of Indian rights due to abrogation is lessened to some degree by the Fifth Amendment's takings clause, which has been construed to require that compensation be given for certain abrogations. See, e.g., *United States v. Sioux*

attack the treaties.²² By upholding the validity of these treaties, the courts "are confirming the continued sovereignty of Indian nations."²³

The status of the Indian nations has been the subject of much debate.²⁴ Although the Supreme Court does not recognize Indian tribes as "states" under international law,²⁵ the Court has described Indian sovereignty to be of a "unique and limited character."²⁶ As a result of the tribes' unique and limited character, courts have developed several special rules of construction for interpreting Indian treaties.²⁷

B. Statutory Canons

There are three special canons of construction for interpreting Indian treaties. These canons address the specific issues of (1) ambiguity, (2) interpretation, and (3) liberal construction.

Nation, 448 U.S. 371, 401-23 (1980); *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937), *appeal after remand*, 304 U.S. 111 (1938). See also COHEN, *supra* note 11, at 468.

22. See *Worcester* 31 U.S. (6 Pet.) at 559 (stating that the United States Constitution allows Congress to make treaties with Indian tribes); *Turner v. American Baptist Missionary Union*, 24 Fed. Case 344 (C.C.D. Mich. 1852) (No. 14,251). "Since the commencement of the government, treaties have been made with the Indians, and the treaty-making power has been exercised in making them. They are treaties, within the meaning of the Constitution, and, as such, are the supreme laws of the land." *Id.* at 346.

23. KICKINGBIRD, *supra* note 2, at 39.

24. Compare *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) (holding that the Cherokee tribe could not be regarded as a "foreign state" within the meaning of article III of the Constitution, so as to permit them to bring an original action in the Supreme Court) with *Worcester*, 31 U.S. (6 Pet.) at 559 (stating that "[t]he Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights"). See also Frank B. Higgins, *International Law Consideration of the American Indian Nations by the United States*, 3 ARIZ. L. REV. 74, 74-77 (1961) (stating that Indians have a peculiar status as "qualified national entities" and yet they are "subject to unilateral fiat of United States sovereign power").

25. Early on, the Court rejected the notion that Indian nations possessed the full sovereignty of foreign nations. See *Worcester*, 31 U.S. (6 Pet.) at 561 (using analogy to "tributary" or "feudatory" states); *Cherokee Nation*, 30 U.S. (5 Pet.) at 18 (stating that Indian nations are not foreign nations within meaning of article III); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (holding Indians' "rights to complete sovereignty, as independent nations, [are] necessarily diminished"). However, the Court has held that tribal sovereignty predates the Constitution and that Indian nations, in addition to the federal government and the states, possess a third source of sovereignty in the United States. See *United States v. Wheeler*, 435 U.S. 313, 319-32 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896). See also John Howard Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 683-700 (1978).

26. *Wheeler*, 435 U.S. at 323. The Court also stated that Indian sovereignty is subject to "complete defeasance" by Congress. *Id.*

27. See, e.g., *Worcester* 31 U.S. (6 Pet.) at 582 (stating "[t]he language used in treaties with the Indians shall never be construed to their prejudice"). See also *United States v. Choctaw Nation*, 179 U.S. 494, 531-36 (1900) (stating that the way that Indians understood the words, rather than the words' critical meaning, should control).

First, ambiguous expressions are resolved in the tribes' favor.²⁸ For example, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,²⁹ the Court held that the words "in common with" and "right of taking fish" suggest an entitlement to a share of fish, rather than just an equal opportunity to fish.³⁰ This canon developed because although treaties should have been understandable to the Indians, the treaties were written exclusively in English, a language few Indians could read or understand at the time the treaties were formed.³¹

Second, treaties are interpreted as the Indians themselves would have understood them.³² This rule developed to rectify the unequal bargaining position the tribes held during treaty negotiations.³³ This

28. See, e.g., *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973) (finding that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation"). For example, a treaty phrase providing for reservation land "to be held as Indian lands are held" included, by implication, the rights to fish and hunt on that land. *Menominee Tribe v. United States*, 391 U.S. 404, 405-06 (1968).

In *Winters v. United States*, 207 U.S. 564 (1908), the Court stated:

By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it . . . it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government.

Id. at 576. See also *United States v. Winans*, 198 U.S. 371, 380 (1905) (finding that the courts will construe a treaty with the Indians as "that unlettered people" understood the treaty).

29. 443 U.S. 658 (1979).

30. *Id.* at 659.

31. *Wilkinson & Volkman*, *supra* note 11, at 610. The authors of that article point out that when more than one Indian tribe was involved in treaty negotiations, the government officials frequently used one language believing it was common to all. *Id.* In fact, the words carried very different meanings to each of the tribes. *Id.* at 610-11. See generally *Duwamish Indians v. United States*, 79 Ct. Cl. 530 (1934), *cert. denied*, 295 U.S. 755 (1935).

32. See, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970), *reh'g denied*, 398 U.S. 945 (1970) (stating that interpretation of the treaties is based on the Indians' understanding of the treaty). For example, the right to hunt on "unoccupied lands of the United States" included a corollary right to fish on those same lands in part because "the particular Indian languages did not employ separate verbs to distinguish between hunting and fishing but rather used a general term for hunting and coupled this with the noun corresponding to the object (either animal or vegetable) sought." *State v. Tinno*, 497 P.2d 1386, 1389 (Idaho 1972).

33. In *Jones v. Meehan*, 175 U.S. 1 (1899), the Court articulated the following rationale for adopting this principle:

In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their

special canon continues to be followed by modern courts³⁴ and this rule has been said to be "virtually identical to the doctrine of *contra proferentum* used in interpreting contracts."³⁵

Third, treaties must be liberally construed in favor of the tribes.³⁶ This canon recognizes that treaty hunting and fishing rights are usually construed not as a grant to the Indians from the federal government, but rather as a reservation of rights not ceded to the federal government.³⁷ Courts apply this canon to ensure that justice and fairness is maintained for the tribes that entered into these treaties.³⁸

These special canons have been established primarily to encourage narrow construction of treaties to protect against invasions of Indian

law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States.

Id. at 10–11. See also *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942) (stating that it is the court's responsibility to carry out the terms of the treaty "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people").

34. See, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675–76 (1979) (noting the superior knowledge and negotiating skills of the United States, the Court held that the treaty must be construed broadly in the Indians' favor); *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 653 F. Supp. 1420, 1429 (W.D. Wis. 1987) (holding that treaties must be construed in favor of the Indians and as the Indians understand them).

35. Kenneth D. Nelson, *Wisconsin, Walleye, and the Supreme Law of the Land: An Overview of the Chippewa Indian Treaty Rights Dispute in Northern Wisconsin*, 11 HAMLINE J. PUB. L. & POL'Y 381, 383 (1990) (citing BLACK'S LAW DICTIONARY 327 (6th ed. 1990), which defines *contra proferentum* as interpreting "an ambiguous provision most strongly against the person who selected the language"). See, e.g., *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (noting that to the extent that ambiguity exists in an insurance contract, "the doctrine of *contra proferentum* requires that the language of [the contract] be construed most strongly against the [party] that drafted it").

36. See, e.g., *Choctaw Nation v. United States*, 318 U.S. 423, 431–32 (1943) (stating that Indian treaties "are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people'" (quoting *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942))). For instance, the Court has liberally construed a treaty providing for lands "to be held as Indian lands are held" to reserve hunting and fishing rights to the tribe. *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968). Moreover, in *United States v. Winans*, 198 U.S. 371 (1905), the Supreme Court held that language reserving to Indians the right to fish at "usual and accustomed places" included an easement to cross over private lands in order to reach these places. *Id.* at 384.

37. *Winans*, 198 U.S. at 381.

38. See, e.g., *id.* at 380–81. "[W]e will construe a treaty with the Indians . . . as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection." *Id.*

interests and to provide broad construction favoring Indian rights.³⁹ However, these canons of construction are applicable only where congressional intent is unclear as to the terms of the agreement.⁴⁰

III. REGULATION OF TREATY RIGHTS

A. Federal Regulation

1. Regulations Limiting Treaty Rights

Efforts by the federal government to regulate express or implied Indian treaty rights to hunt and fish raise questions regarding federal versus tribal jurisdiction. Although Congress has the power to abrogate Indian hunting and fishing treaty rights,⁴¹ only the tribes can regulate on-reservation fishing and hunting unless Congress acts affirmatively to regulate these rights.⁴² However, where the federal government has jurisdiction to regulate off-reservation reserved rights, that federal power is plenary.⁴³

Congress can use this plenary power to unilaterally abrogate or modify off-reservation treaty rights,⁴⁴ and is limited only by the takings re-

39. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1140-41 (1990). "Sometimes courts will find an invasion of Indian rights only upon a 'clear showing' of legislative intent; other times, such an invasion will not be 'lightly implied'; still other cases suggest that such an invasion may be found only after the court has engaged in 'liberal construction' in favor of Indian rights." *Id.* at 1141, n.27 (citing Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?*, 63 CALIF. L. REV. 601, 623-26 (1975)).

40. *Id.* at 1141. "The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *Id.* at 1141 n.28 (citing *United States v. Dion*, 476 U.S. 734, 739-40 (1986); *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986)).

41. See *United States v. Dion*, 476 U.S. 734, 745 (1986) (holding that the Bald Eagle Protection Act abrogated Indian treaty rights).

42. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330 (1983) (holding that the tribe rather than the state regulates elk hunting on the reservation). See also *United States v. Washington*, 384 F. Supp. 312, 337 (W.D. Wash. 1974) (stating that treaty rights "may be limited or modified in any particular way or to any extent by or with authority of Congress"), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh'g denied*, 424 U.S. 978 (1976). In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court held that Congress could, in a pressing national emergency, do whatever was necessary with Indian lands. The Court, however, was unable to point out exactly what emergency existed. *Id.* at 564.

43. This power is based on the Commerce, Treaty, and Supremacy Clauses of the United States Constitution. COHEN, *supra* note 11 at 219-20.

44. *Lone Wolf*, 187 U.S. at 564-67. Although judicial review of federal legislation passed pursuant to this plenary power has traditionally been limited, the Supreme Court has indicated a movement toward a more searching review. See generally, Comment, *Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235 (1982).

strictions of the Fifth Amendment.⁴⁵ However, federal regulation of off-reservation hunting and fishing rights must be authorized by federal statute as regulation that is essentially a modification of those rights.⁴⁶ Congress could regulate every aspect of Indian hunting and fishing if desired,⁴⁷ but the federal government generally has sparingly regulated Indian hunting and fishing.⁴⁸

2. Regulations Protecting Treaty Rights

A significant counterweight to Congress's plenary power is the federal trust responsibility.⁴⁹ This federal trust responsibility is analogous to the relationship between a guardian and a ward.⁵⁰ The primary goals of this guardianship is to promote tribal self-government and preserve tribal sovereignty.⁵¹

In light of the federal government's role as a guardian, courts generally refuse to imply congressional intent to abrogate treaty rights absent an explicit statement of congressional intent.⁵² Moreover, courts

45. See U.S. CONST. amend. V. See also *Andrus v. Allard*, 444 U.S. 51, 64–68 (1979) (stating the government regulation “involves the adjustment of rights for the public good”). See generally RICHARD R. POWELL & PATRICK J. ROHAN, *THE LAW OF REAL PROPERTY* §§ 866–866.6 (1984).

46. COHEN, *supra* note 11, at 467–68.

47. Although Congress has the power to extinguish Indian hunting and fishing rights, a court will not recognize an extinguishment of these vital rights unless Congress has clearly expressed an intention to eliminate them. In *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the Supreme Court held that the Menominee tribe retained hunting and fishing rights even though Congress had terminated the reservation, since the termination statute did not mention hunting and fishing rights. *Id.* at 415–17.

48. Hunting and fishing have been left largely for tribal regulation. However, in one instance where the tribe failed to act, federal authorities prosecuted a tribal member under a federal trespass statute, 18 U.S.C. § 1165 (1988), that forbids unauthorized entry upon Indian lands for the purpose of hunting, trapping, or fishing. The statute was held to be inapplicable to Indians. See *United States v. Jackson*, 600 F.2d 1283 (9th Cir. 1979). In 1981, however, Congress amended the Lacey Act to prohibit transport of, or traffic in, fish or wildlife taken, possessed, or sold in violation of any federal, state, or tribal law. 16 U.S.C. § 3372(a) (1988). That prohibition was held applicable to Indians. See *United States v. Sohappay*, 770 F.2d 816 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986).

49. A discussion of federal trust responsibility is found in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), where Justice Marshall found that tribes were “domestic dependent nations” that looked to the federal government for protection. *Id.* at 17.

50. Under federal law, the United States Attorney must represent tribes in “all suits at law and equity.” 25 U.S.C. § 175 (1988). However, this duty has been held to be discretionary in some situations. See, e.g., *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

51. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–35 (1983) (noting federal government commitment to furthering tribal self-government).

52. See, e.g., *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (refusing to find that a federal statute terminating the tribe's reservation also destroyed the tribe's hunting and fishing rights).

have applied this same test to determine whether federal statutes of general application apply equally to Indian and non-Indian citizens when application of the statute would conflict with guaranteed treaty rights.⁵³

When Indian treaty rights are threatened, the United States government has a firmly established duty under the Federal Indian trust relationship to "take legal action to help protect those rights."⁵⁴ The Supreme Court has characterized this trust responsibility as a "moral obligation[] of the highest responsibility and trust."⁵⁵ However, the United States government often ignores this duty⁵⁶ as a consequence of the various conflicts of interest the federal government faces in many of the legal actions involving Indian tribes.⁵⁷ These conflicts occur when the "national interests" that the federal government must advocate run counter to the "private interests" of the Indian tribes that the federal government also has an obligation to advance.⁵⁸

The results can be a mixed blessing for the tribes even when the government does not ignore this trust duty.⁵⁹ Even when attempting to help, the federal government can sometimes damage Indian

53. Statutes of general applicability that conflict with Indian treaty rights will be found to abrogate treaty hunting rights if Congress has shown a clear intent to do so, but may also abrogate those rights by implication. Compare *United States v. White*, 508 F.2d 453, 458-59 (8th Cir. 1974) (holding the Bald Eagle Protection Act, 16 U.S.C. §§ 668a-668d (1988), did not abrogate treaty-based hunting rights because it did not expressly address Indian hunting rights) with *United States v. Fryberg*, 622 F.2d 1010, 1016 (9th Cir.), cert. denied, 449 U.S. 1004 (1980) (holding the Bald Eagle Protection Act abrogated Indian treaty rights by implication). The Supreme Court apparently resolved this particular issue by holding that the Bald Eagle Protection Act abrogated Indian treaty hunting rights by implication. *United States v. Dion*, 476 U.S. 734, 745 (1986).

54. GILBERT L. HALL, *THE FEDERAL-INDIAN TRUST RELATIONSHIP: THE DUTY OF PROTECTION* 43 (1981) (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *United States v. Washington*, 520 F.2d 676 (9th Cir.), cert. denied, 423 U.S. 1086 (1975), reh'g denied, 424 U.S. 978 (1976)).

55. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

56. HALL, *supra* note 54, at 43. "It took a law suit by the Passamaquoddies to force the Department of Justice to represent the tribe in its land claim against the state of Maine." *Id.* at 69 n.26 (citing *Edwardsen v. Morton*, 369 F. Supp. 1359 (D. D.C. 1973); *Gila River Pima Maricopa Indian Community v. United States*, 427 F.2d 1194 (Ct. Cl. 1970)).

57. See MONROE E. PRICE, *LAW AND THE AMERICAN INDIAN* 600-01 (1973).

58. *Id.*

No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.

Id. at 601.

59. HALL, *supra* note 54, at 43.

rights.⁶⁰ One cannot dispute, however, that when the United States government mobilizes federal legal forces and financial resources “[the government] can be an effective legal advocate for Indian interests.”⁶¹

B. Tribal Regulation

1. Origin and Extent of Regulation

Tribal regulatory jurisdiction arises both from the retained inherent sovereignty of Indian tribes⁶² and from Indian treaties.⁶³ To that end, the concept of tribal sovereignty has been the basis for Supreme Court decisions upholding “a tribe’s asserted power to criminally prosecute tribal members,[⁶⁴] to impose taxes on non-members who engage in on-reservation activities,[⁶⁵] to determine tribal membership,[⁶⁶] and to define the rules of property inheritance.”⁶⁷

Additionally, Indian treaties have been found to impliedly reserve exclusive on-reservation resource exploitation rights for Indian tribes.⁶⁸ Courts have held that “[Indian] tribes with treaty rights can fish and hunt on their reservation without any state regulation except that necessary for conservation purposes.”⁶⁹

60. *Id.*

61. *Id.*

62. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (holding that in the interest of tribal sovereignty and the absence of state interests the application of state hunting and fishing laws to the reservation is preempted). *See also* *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980), *reh’g denied*, 448 U.S. 911 (1980) (holding that tribal sovereignty encompasses tribal control over members and territory); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (stating “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status”).

63. *Montana v. United States*, 450 U.S. 544, 558–59 (1981), *reh’g denied*, 452 U.S. 911 (1981) (holding that an Indian tribe did not have regulatory jurisdiction where it did not exercise “absolute and undisturbed use and occupation” of the land).

64. *See Wheeler*, 435 U.S. at 332.

65. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). *Cf. Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (denying state taxation of on-reservation Indians).

66. *See Cherokee Intermarriage Cases*, 203 U.S. 76 (1906).

67. Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743, 759 (1984).

68. *See, e.g., Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968) (noting that the 1854 Treaty of Wolf River included the right to hunt and fish although not expressly mentioned in the treaty).

69. Robert J. Miller, *Native Rights: Indian Hunting and Fishing Rights*, 21 ENVTL. L. 1291, 1292 (1991) (citing *Tulee v. Washington*, 315 U.S. 681, 685 (1942); *Puyallup Tribe v. Department of Game of Wash.*, 433 U.S. 165, 175 (1977)). *See also* *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (noting the State’s failure to establish that a ban on out-of-season deer hunting by Indians is in any way necessary or useful for deer conservation). *But see* *Department of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 49 (1973). “The treaty does not give the Indians a federal right to pursue the last steel-head until it enters their nets.” *Id.* The *Puyallup* decisions, however, have been criti-

A tribe's exclusive authority to regulate on-reservation hunting and fishing is derived in part from the tribe's power to exclude nonmembers from the reservation⁷⁰ and in part from the tribe's retained inherent sovereignty over tribal territory.⁷¹ Pursuant to their authority to regulate "internal [affairs] and social relations,"⁷² some Indian tribes have adopted codes controlling the time, place, and manner of hunting and fishing by tribal members.⁷³ In addition, "[v]iolations of tribal codes may subject members to the criminal jurisdiction of tribal courts."⁷⁴

Indian tribes have also retained rights regarding off-reservation fishing and hunting.⁷⁵ As such, "Indians cannot be restricted [by states] as to what fishing gear they use or by a catch limit."⁷⁶ In addition, "[t]ribal members cannot be charged a license fee [by a state] to exer-

cized for failing to adequately explain why a state could regulate for conservation purposes. *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 653 F. Supp. 1420, 1434 (W.D. Wis. 1987). For a critique of the *Lac Courte Oreilles* court's reliance on the *Puyallup* decisions, see David Michael Ujke, Note, *State Regulation of Lake Superior Chippewa Off-Reservation Usufructuary Rights: Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420 (W.D. Wis. 1987), 11 HAMLINE L. REV. 153 (1988).

70. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 131 (1982) (holding that "[e]ven if the Tribe's power to tax were derived solely from its power to exclude non-Indians from the reservation, the Tribe [still] has the authority to impose [a] severance tax"); *Quechan Tribe v. Rowe*, 531 F.2d 408, 410 (9th Cir. 1976) (holding that "[i]n the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the inherent power to exclude non-members from the reservation"); *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179-80 (9th Cir. 1975) (noting that an Indian tribe may lawfully empower police officers to aid in the enforcement of tribal law and in the exercise of tribal power).

71. *Merrion*, 455 U.S. at 137 (stating that "[t]he power to tax is an essential attribute of Indian sovereignty"); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152, *reh'g denied*, 448 U.S. 911 (1980) (Brennan, J. & Marshall, J., concurring in part, dissenting in part) (stating that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status" (citing *United States v. Wheeler*, 435 U.S. 313 (1978))); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (stating that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832))).

72. *United States v. Kagama*, 118 U.S. 375, 382 (1886), *quoted in Reynolds*, *supra* note 67, at 760.

73. *Reynolds*, *supra* note 67, at 760.

74. *Id.* (citing *Puyallup Tribe v. Starr-Moses*, 10 Indian L. Rep. 6028 (Puyallup Tribal Ct. 1983)).

75. *Miller*, *supra* note 69, at 1293 (citing *Antoine v. Washington*, 420 U.S. 194, 206 (1975)).

76. *Id.* (citing *Puyallup Tribe v. Department of Game of Wash.*, 433 U.S. 165 (1977)). "Only necessary conservation methods can limit the Indian catch and they must be reasonable and nondiscriminatory." *Id.* at 1293 n.14 (citing *Department of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 48 (1973)).

cise treaty rights that their ancestors reserved long ago.”⁷⁷ Moreover, “a measured Indian ‘take’ is allowed [from off-reservation hunting and fishing] to provide reservation Indians with a ‘moderate living.’”⁷⁸

Regardless of whether a treaty contains an express provision that the tribe seeks to retain off-reservation hunting and fishing rights, some courts have found an implied reservation of those rights.⁷⁹ For example, in *State v. Clark*,⁸⁰ the Minnesota Supreme Court held that “it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to give them a home” when analyzing a treaty that failed to expressly retain off-reservation hunting and fishing rights.⁸¹ Once a court determines that express or implied off-reservation hunting and fishing rights have been retained, these rights then receive federal protection.⁸²

2. Recognition of Tribal Sovereignty

Federal recognition of a tribe’s sovereign power to regulate tribal members and tribal lands confirms the federal government’s commitment to protect this inherent power.⁸³ However, the “[r]ecognition of broad tribal powers over hunting and fishing in no way implies an unlimited tribal right to disregard important state and federal interests in

77. Miller, *supra* note 69, at 1293 (citing *Tulee v. Washington*, 315 U.S. 681, 685 (1942)). See generally DAVID H. GETCHES & CHARLES F. WILKINSON, *FEDERAL INDIAN LAW* 716–72 (2d. ed. 1986).

78. Miller, *supra* note 69, at 1293 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 686 (1979)). “The federal district court in Washington State held that treaty language allowing Indians to fish ‘in common with citizens of the United States’ means the tribes can take fifty percent of the harvest of anadromous fish in the Columbia River and Puget Sound.” *Id.* (citing the Treaty with the Walla, Cayuse, and Umatilla, June 9, 1855, art. I, 12 Stat. 945, 946, reprinted in, 2 CHARLES J. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES* 694, 695 (1904)). See also *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh’g denied*, 424 U.S. 978 (1976) (holding that fish taken for personal subsistence should not be counted toward the share of fish allotted pursuant to the treaty).

79. See, e.g., *State v. Lowe*, 327 N.W.2d 166, 169 (Wis. Ct. App. 1982) (finding an adequate expression of intent to reserve off-reservation fishing rights due to evidence that the tribe historically had fished in the waters and that the reason the United States purchased the land for a reservation was because of the importance of tribal fishing). See also *State v. Clark*, 282 N.W.2d 902, 908–09 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980) (holding that the Chippewa reacquired hunting and fishing rights due to their interpretation of the treaty and conduct in accordance with the treaty).

80. 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980).

81. *Id.* at 909.

82. See generally HALL, *supra* note 54, at 14 (discussing the duty to help protect and manage Indian trust property).

83. Reynolds, *supra* note 67, at 766. Federal recognition may be derived from “explicit treaty language granting off or on-reservation rights, from reasonable implications of the federal purpose revealed by the creation of the reservation itself, or from general federal legislation.” *Id.*

the preservation of game and wildlife."⁸⁴ Consequently, tribal sovereignty can be limited by federal legislation⁸⁵ or, in some instances, state legislation.⁸⁶

Although the Constitution guarantees that Indian treaty rights generally preempt state regulation,⁸⁷ courts have held in some instances that state conservation laws similar to Indian tribal regulations are enforceable against tribal members.⁸⁸ Nevertheless, federal recognition of a tribe's authority to regulate the hunting and fishing activities of tribal members on tribal lands supports the position that tribal sovereignty can be limited only if overriding state or federal interests are clearly established.⁸⁹

C. State Regulation

1. Origin

State regulation of hunting and fishing is generally permissible to the extent it promotes a valid police power objective.⁹⁰ Although a state has no ownership interest in the fish and game within a state's borders, the United States Supreme Court has repeatedly recognized legitimate state interests in the conservation and protection of wildlife.⁹¹

84. *Id.*

85. *Id.* "Although federal power to regulate any aspect of Indian affairs is undisputed, a court will require a clear expression of congressional intent to apply a particular statute to areas otherwise within the retained sovereign power of the tribe." *Id.* at n.150 (citing *United States v. Jackson*, 600 F.2d 1283 (9th Cir. 1979)).

86. See generally *Reynolds*, *supra* note 67, at 766.

87. See U.S. CONST. art. VI, *supra* note 19. A state regulation will be upheld against tribal members if the state can establish that the regulation is necessary for conservation, is the least restrictive alternative available, and does not discriminate against Indians. See *infra* part III.C.2.

88. See, e.g., *United States v. Williams*, 898 F.2d 727, 729-30 (9th Cir. 1990) (holding that an Indian tribe member violated a state conservation act similar to the tribe's hunting and fishing treaty rights).

89. *Reynolds*, *supra* note 67, at 766.

90. "The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource Additionally, state regulation must not discriminate against the Indians" *United States v. Washington*, 384 F. Supp. 312, 333 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh'g denied*, 424 U.S. 978 (1976).

91. See *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977) (stating that "[n]either the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture"). See also *Hughes v. Oklahoma*, 441 U.S. 322, 337-38 (1979) (requiring that the State's legitimate conservation interests not conflict with interstate commerce); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 385 (1978) (stating that "the Court has recognized that the States' interest in regulating and controlling those things they claim to 'own,' including wildlife, is by no means absolute").

However, a state's broad powers to regulate hunting and fishing are limited by the obligation to recognize treaty rights. State regulation resulting in non-Indian hunting and fishing that infringes on reserved treaty rights by making the exercise of these rights impossible constitutes an invalid infringement on a federal right.⁹²

Nevertheless, "the Constitution is silent concerning whether states have any authority to regulate [on Indian reservations]." ⁹³ In *Worcester v. Georgia*,⁹⁴ Chief Justice Marshall attempted to assign exclusive authority to regulate the Indian tribes to the federal government.⁹⁵ However, "[a] century and a half later, this flat prohibition against unilateral state assertions of authority has eroded."⁹⁶

For example, two more recent Supreme Court decisions involving trout and salmon fishing disputes concluded that state regulations can apply to on-reservation activity. In *Puyallup Tribe v. Department of Game of Washington*,⁹⁷ the Court explicitly rejected a claim of exclusive right to all fish passing through the tribe's reservation.⁹⁸ Also, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*,⁹⁹ the Court found that the place where fish are taken was irrelevant to the apportionment between treaty and non-treaty fishermen.¹⁰⁰ Indian tribes, therefore, arguably do not have sovereign power for all purposes.

92. *Washington*, 384 F. Supp. at 407 (holding that "[b]ecause the right of each Treaty Tribe to take anadromous fish arises from a treaty with the United States, that right is preserved and protected under the supreme law of the land, does not depend on State law, is distinct from rights or privileges held by others, and may not be qualified by any action of the State"). See also *United States v. Washington*, 694 F.2d 1374, 1380-82 (9th Cir. 1982), *vacated, op. replaced on reh'g*, 759 F.2d 1353 (9th Cir.), *cert. denied*, 474 U.S. 994 (1985) (finding that "Indians' right of access to accustomed fishing places may not be impaired"); *Sohappy v. Smith*, 302 F. Supp. 899, 911 (D. Or. 1969) (stating that "the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users").

93. Frickey, *supra* note 39, at 1168. "The only provision in the Constitution expressly governing the allocation of power to deal with Indians is the Indian commerce clause . . . which provides that Congress has the authority to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'" *Id.* at 1168-69 n.179 (citing U.S. CONST. art. I, § 8, cl. 3).

94. 31 U.S. (6 Pet.) 515 (1832).

95. Frickey, *supra* note 39, at 1168-69. Chief Justice Marshall described an Indian reservation as "a distinct community occupying its own territory . . . in which the laws of [the state] can have no force." *Worcester*, 31 U.S. (6 Pet.) at 561.

96. Frickey, *supra* note 39, at 1169.

97. 433 U.S. 165 (1977).

98. *Id.* at 173-77.

99. 443 U.S. 658 (1979).

100. *Id.* at 687-88.

2. Limits on State Regulation

Although states have a strong interest in regulating the fish and wild-life within their borders, several obstacles restrict the exercise of this authority over off-reservation Indian hunting and fishing.¹⁰¹ The primary obstacle is the Supremacy Clause,¹⁰² which provides that a state's regulatory authority is preempted by federal statute or treaty.¹⁰³ "The [S]upremacy [C]ause, when coupled with the fact that only Congress can abrogate or modify treaties, seems to indicate that states have essentially no power to regulate treaty-based hunting or fishing."¹⁰⁴

However, courts have held that unless federal law provides otherwise, states can subject Indian off-reservation hunting and fishing to nondiscriminatory regulations.¹⁰⁵ The Supreme Court has concluded that a state may regulate in the interest of conservation provided that the regulation meets two requirements: (1) the regulation must be a "reasonable and necessary conservation measure," and (2) application to the Indians must be "necessary in the interest of conservation."¹⁰⁶

To fulfill the first requirement, a state must show that the regulation is necessary to ensure the continued existence of the resource.¹⁰⁷ As a result, if a tribe is able to establish that the tribe is already adequately regulating tribal members to ensure preservation of the resource, then the state regulation of that particular resource will be deemed unnecessary.¹⁰⁸

The second requirement has been interpreted as imposing a "least restrictive alternative" requirement on the regulation of treaty rights.¹⁰⁹ This element requires the state police power to first be exercised over non-Indian citizens to achieve the conservation goal.¹¹⁰ In summary, these two requirements impose strict limits on the state's ability to regulate off-reservation hunting and fishing rights in the interest of conservation.

101. Nye, *supra* note 16, at 181.

102. U.S. CONST. art. VI, cl. 2.

103. Nye, *supra* note 16, at 181. "The pre-emption doctrine, together with a weighing of state, tribal and federal interests, is the primary tool used by courts to decide jurisdictional issues on Indian reservations." *Id.* at 181 n.51 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980)).

104. *Id.* at 181.

105. See, e.g., *Mescalero v. Jones*, 411 U.S. 145, 148-49 (1973). See also *Russ v. Wilkins*, 624 F.2d 914 (9th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *United States v. Washington*, 384 F. Supp. 312, 408-09 (W.D. Wash.), *aff'd*, 520 F.2d 676 (9th Cir. 1974), *cert. denied*, 423 U.S. 1086, *reh'g denied*, 424 U.S. 978 (1976).

106. *Antoine v. Washington*, 420 U.S. 194, 207 (1975).

107. *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 401-02 (1968), *reh'g denied*, 393 U.S. 898 (1968).

108. *Washington*, 384 F. Supp. at 340.

109. See *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981).

110. *Washington*, 384 F. Supp. at 407.

IV. A BRIEF REVIEW OF THE EVOLUTION OF FEDERAL INDIAN POLICY

Federal Indian policy has been marked by inconsistent objectives and numerous shifts over the past century. At times, the primary objective has been to promote assimilation of Native Americans into American society. At other times, however, the objective has been to protect the autonomy of Native Americans.

A. *Indian Reorganization Act of 1934*

One example of federal policy, the Indian Reorganization Act,¹¹¹ was enacted in 1934 during a period in which Federal Indian policy sought to protect the autonomy of Native Americans by promoting tribal self-governance.¹¹² To aid in self-governance, the Act gave tribes the power to adopt constitutions and bylaws that became effective upon ratification by tribal members and approval by the Secretary of the Interior.¹¹³ This Act was a concerted effort by Congress to strengthen, rather than destroy, the Federal-Indian relationship.

B. *Termination*

Federal Indian policy took a dramatic turn approximately twenty years after the enactment of the Indian Reorganization Act. In an effort to assimilate Indians into mainstream America, Congress enacted legislation specifically intended to dissolve the unique relationship between the Indians and the federal government. Termination was officially adopted as Federal Indian policy when Congress passed House Concurrent Resolution 108 in 1953.¹¹⁴ This resolution stated in part:

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States and to grant them all the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians . . . should assume their full responsibilities as American citizens: Now, therefore, be it Resolved by the House of

111. 25 U.S.C. §§ 461-479 (1988).

112. The Indian Reorganization Act of 1934 has been referred to as "perhaps the most fundamental and far-reaching piece of legislation passed by Congress in this century." DELORIA, *supra* note 13, at 187.

113. Section 16 of the Act provides in part:

Any Indian tribe, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws and any amendments thereto which shall become effective when (1) ratified by a majority vote of the adult members of the tribe, or tribes, at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe [and] (2) approved by the Secretary pursuant to subsection (d).

25 U.S.C. § 476 (1988).

114. H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

Representatives (The Senate concurring) that . . . at the earliest possible time, all of the Indian tribes and individual members thereof located within the States of California, Florida, New York, and Texas . . . should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians

It is further declared to be the sense of Congress that, upon release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs . . . whose primary purpose was to serve any Indian tribe or individual Indian freed from federal supervision should be abolished.¹¹⁵

Congress rationalized this termination policy as a means of "freeing" Indians from federal control and granting them full citizenship rights.¹¹⁶ However, for those Indians affected, this policy actually resulted in abrogation of treaty rights, harassment by state and local governments, and, for some, near economic and social disaster.¹¹⁷

The termination policy expressed in Resolution 108 was implemented through the passage of Public Law 280.¹¹⁸ Public Law 280 modified certain aspects of the relationship between the United States and affected Indian tribes by granting certain states¹¹⁹ the power to exercise civil and criminal jurisdiction over particular Indian tribes.¹²⁰ The Act shifted the balance of jurisdictional power toward the states and away from the federal government and Indian tribes. However, the Act neither granted the states total jurisdictional power nor terminated the federal trust relationship that existed between the federal government and Indian tribes.¹²¹ The Act also prohibited states from

115. *Id.*

116. See generally Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 540-45 (1975) (discussing legislative background to Public Law 280's adoption).

117. For a detailed discussion of termination, see Charles F. Wilkinson and Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

118. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1988)).

119. The original states were California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon, and Wisconsin (except for the Menominee reservation). However, the Menominees were added to the list in 1954. See 1954 U.S.C.C.A.N. 3171. In addition, Alaska was added in 1958. See 1958 U.S.C.C.A.N. 3347. Public Law 280 also gave power to other states to assume legislatively enacted jurisdiction. Pub. L. No. 83-280, ch. 505, § 7, 67 Stat. 588, 590 (1953) (current version at 25 U.S.C. §§ 1321(a), 1322(a) (1988) (authorizing a state to assume jurisdiction over Indian lands only with the tribe's permission)).

120. Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 28 U.S.C. 1360 (1988)).

121. *California ex rel. Cal. Dep't of Fish & Game v. Quechan Tribe*, 595 F.2d 1153, 1156 (9th Cir. 1979) (holding that tribe's sovereign immunity barred lawsuit by state to enforce fishing and game laws against non-Indians on reservations). Public Law 280 states:

Nothing in this act shall authorize the: alienation, encumbrance or taxation of any real or personal property, including water rights, belonging to any Indian

interfering with Indian hunting and fishing rights or deciding questions of ownership of trust property.¹²²

In 1976, the United States Supreme Court clarified the limits of this Act by declaring as invalid state attempts to tax Indians and control their activities on the reservations.¹²³ In *Bryan v. Itasca County*,¹²⁴ a Minnesota county assessed a personal property tax on an Indian-owned trailer home located on an Indian reservation.¹²⁵ The county maintained that the tax was valid because the land was not being taxed.¹²⁶ The Minnesota Supreme Court agreed and allowed the tax.¹²⁷ On appeal, the United States Supreme Court reversed the decision on the basis that the tax was a regulatory scheme that was beyond the scope of Public Law 280.¹²⁸

Writing for the majority, Justice Brennan found that the primary purpose of Public Law 280 was to extend the state's jurisdictional bounds only in criminal and civil cases and that the Act was not intended to effect the total assimilation of Indian tribes.¹²⁹ To the contrary, Justice Brennan concluded that the Act should be construed narrowly to apply only to questions of jurisdiction.¹³⁰ Thus, any state attempts to exert power through a regulatory scheme were clearly outside the scope of the Act.¹³¹

C. *Indian Civil Rights Act of 1968*

Federal Indian policy took another significant shift in focus with the passage of the Indian Civil Rights Act of 1968.¹³² This Act amended Public Law 280 so that states were now required to obtain consent from affected tribes prior to exercising jurisdiction over the Indian lands.¹³³ This Act also included provisions requiring that all Indian tribes, in exercising their self-governing powers, observe and protect

or Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation or the use of such property in a manner inconsistent with any federal treaty, agreement or statute or with any regulation made pursuant thereto

25 U.S.C. § 1321(b) (1988).

122. 28 U.S.C. § 1360(b) (1988).

123. *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976).

124. 303 Minn. 395, 228 N.W.2d 249 (1975), *rev'd*, 426 U.S. 373 (1976).

125. *Id.* at 396-97, 228 N.W.2d at 251.

126. *Id.* at 397, 228 N.W.2d at 251.

127. *Id.* at 407, 228 N.W.2d at 256.

128. *Bryan*, 426 U.S. at 378-79.

129. *Id.* at 387.

130. *Id.* at 388.

131. *Id.* at 384.

132. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified in part at 25 U.S.C. §§ 1301-1322, 1326 (1988)).

133. 25 U.S.C. §§ 1321-22, 1326 (1988). However, the Act did not affect the six original states' jurisdictional control over Indian affairs. *Id.* at § 1326.

the freedom of speech, freedom of religion, due process, and equal protection of the laws.¹³⁴

This renewed focus on tribal sovereignty became clearer in 1970. At that time, President Nixon declared an end to the Federal Indian termination policy and notified Congress that he intended to protect the Indian lands by transferring control of Indian programs from federal to tribal governments.¹³⁵

These are but a few examples of legislative and executive pronouncements concerning the federal government's Indian policy throughout the 1900s. As indicated, the government's objectives regarding the Indian peoples have been the subject of frequent change, which has resulted in an inconsistent and unpredictable federal policy.

V. THE CHIPPEWA TREATIES AND THE PRESIDENTIAL REMOVAL ORDER OF 1850

A. *Treaty of 1837*

In 1837, Wisconsin Territorial Governor, Henry Dodge, entered into treaty negotiations with the Chippewa Indian tribes for the purchase of land in what is now eastern-central Minnesota and northern Wisconsin.¹³⁶ The initial government objective in purchasing this land was to acquire timber and make way for settlers.¹³⁷ However, the government's long-term goal was to remove the tribes from the area.¹³⁸

On July 29, 1837, "at a council near Fort Snelling at the mouth of the St. Peter's River, the Chippewa . . . ceded thousands of square miles of timber land in the St. Croix watershed of Minnesota and Wisconsin."¹³⁹ The Chippewa tribes were offered and accepted \$9,500 dollars cash, \$19,000 worth of goods, \$3000 worth of supplies to establish blacksmith shops, \$1000 for farmers, \$2000 worth of provisions, and \$500 worth of tobacco in exchange for relinquishing control of their land and timber.¹⁴⁰

134. 25 U.S.C. § 1302 (1988).

135. ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 160 (3d ed. 1991) (citing Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970)).

136. 1837 Treaty, *supra* note 4.

137. Robert H. Keller, *The Chippewa Treaties of 1842 and 1854*, 9, No. 4 *AM. INDIAN J.* 10, 10 (1987).

138. *Id.* "Removal was deemed necessary because of the increasing pressure by Euroamericans on, principally, tribal lands in the South and Southeast and because of increasingly bitter federal-state jurisdiction conflicts related to Indian lands." CONFERENCE OF WESTERN ATTORNEYS GENERAL, *AMERICAN INDIAN LAW DESKBOOK* 13 (1993) (citing FRANCIS P. PRUCHA, *THE GREAT FATHER* 195-200 (1984)).

139. See Keller, *supra* note 137, at 11.

140. 1837 Treaty, *supra* note 4, at 67-69.

Many of the tribes would have allowed timber and other resource removal without payment, but wished to keep the land and the tribes' right to traditional uses of that land.¹⁴¹ To protect their right to use the land, tribal leaders demanded guarantees that they be permitted to continue to hunt, fish, and gather wild rice (the first recognition of that right in a Chippewa treaty¹⁴²) on the ceded territory.¹⁴³

At the negotiations, Aish-ke-bo-ge-koshe,¹⁴⁴ an Indian chief from Leech Lake, stated: "Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the lakes and rivers, as they have done heretofore, and of remaining in the country."¹⁴⁵ Henry Dodge replied: "I will make known to your Great Father [the President of the United States], your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years before your Great Father will want all these lands for the use of his White Children."¹⁴⁶

The United States agreed to these demands, and the privileges were reserved in Article Five of the treaty.¹⁴⁷

B. Treaty of 1842

In 1842, the United States entered into a second treaty with the Chippewa tribe.¹⁴⁸ Again, the government's primary objective was to

141. Keller, *supra* note 137, at 11.

142. *Id.*

143. Nelson, *supra* note 35, at 384.

144. Aish-ke-bo-ge-koshe, or Flat Mouth, was one of 51 Chippewa chiefs and warriors who signed the 1837 Treaty with the government. See Charles F. Wilkinson, *To Feel The Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 387 (1991).

145. Aish-ke-bo-ge-koshe's speech was recorded by the secretary of the 1837 treaty council, Verplanck Van Antwerp. Wilkinson, *supra* note 144, at 387 n.59 (citing *United States v. Bouchard*, 464 F. Supp. 1316, 1323 (W.D. Wis. 1978)).

146. See *Lac Courte Oreilles Band of Chippewa v. Voigt*, 700 F.2d 341, 344 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983).

147. Article Five states: "The privilege of hunting, fishing, and gathering the wild rice, upon the rivers and the lakes included in the territory ceded, is guarantied (sic) to the Indians, during the pleasure of the United States President." 1837 Treaty, *supra* note 4, at 67-69. "The word ['reserved'] is emphasized because it is one of the most fundamental of Indian law principles. The reserved rights doctrine recognizes that treaty rights are not gifts to Indians, but rather terms bargained for between sovereign nations. Whatever rights are not negotiated away from the tribes are retained or reserved by them." Nelson, *supra* note 35, at n.28 (citing *United States v. Winans*, 198 U.S. 371, 381 (1905)).

148. Treaty with the Chippewa, Oct. 4, 1842, U.S.-Chippewa, 7 Stat. 591, *reprinted in* INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, TREATIES & AGREEMENTS OF THE CHIPPEWA INDIANS, 73-75 (1974) ("1842 Treaty").

accumulate land for impending population expansion.¹⁴⁹ Similar to the 1837 treaty, the 1842 treaty also contained a provision reserving off-reservation hunting, fishing, and gathering rights for the Chippewa until the President required removal of the tribe.¹⁵⁰

C. Removal Order of 1850

Accepting the recommendations of the Commissioner of Indian Affairs and the Legislative Assembly of the Minnesota Territory, President Zachary Taylor issued an executive order on February 6, 1850 that removed the Chippewa Indians from the territories ceded in the 1837 and 1842 treaties.¹⁵¹

"The Indians were surprised and dismayed by the [removal] order,"¹⁵² because they were under the impression that they would only be removed for misbehavior and there was no evidence of misbehavior.¹⁵³ "At the time the Order was issued, [the Mille Lacs Band of Chippewa] peaceably occupied lands and waters that were forty to fifty miles from the nearest white settlement, and had given no offense that might conceivably have justified the Removal Order."¹⁵⁴ In fact, the 1854 Wisconsin Legislature stated in a letter to the President and Congress requesting the rescission of the removal order that the Chippewa Indians were a "peaceable, quiet, and inoffensive people."¹⁵⁵

The removal order was allegedly countermanded by President Fillmore after several Chippewa Chiefs went to Washington in April 1852.¹⁵⁶ Unfortunately, no record of the countermand currently exists.¹⁵⁷

149. Nelson, *supra* note 35, at 384 (citing *Lac Courte Oreilles Band of Chippewa v. Voigt*, 700 F.2d 341, 345 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983)).

150. 1842 Treaty, *supra* note 148, at 73-75 (stating "the Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States . . .").

151. *Lac Courte Oreilles Band of Chippewa v. Voigt*, 700 F.2d 344, 346 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983). President Taylor's removal order provided:

The privileges granted temporarily to the Chippewa Indians of Mississippi by [the Treaty of 1837, art. 5] . . . and the rights granted to the Chippewa Indians of the Mississippi and Lake Superior by the second article of the treaty with them of October 4th, 1842 . . . are hereby revoked and all of the said Indians on the lands ceded as aforesaid, are required to remove to the unceded lands.

Id. (emphasis added).

152. *Id.* at 346.

153. *Id.* at 346-47.

154. Plaintiff's Memorandum in Support of Partial Summary Judgment Dismissing ICCA and Indispensable Party Defenses at 8, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990).

155. *Voigt*, 700 F.2d at 348.

156. *Id.* at 347.

157. *Id.* at 348.

D. Treaty of 1854

On September 30, 1854, the Treaty of La Pointe was negotiated between the Lake Superior Chippewa tribes and the United States government.¹⁵⁸ The Chippewa tribe "sold their claims to land in northern Minnesota . . . in exchange for reservations within the 1837 and 1842 ceded territories, over which they would have exclusive control."¹⁵⁹

Similar to the 1837 and 1842 treaties, this treaty also expressly reserved off-reservation hunting and fishing rights for tribe members.¹⁶⁰ Article Eleven of the 1854 treaty provides: "And such [Indians] as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President."¹⁶¹ This treaty, however, did not make any mention of the hunting, fishing, and gathering rights of the Chippewa Indians residing in the 1837 and 1842 ceded territories.¹⁶²

E. Treaty of 1855

On February 22, 1855, the Mississippi, Pillager, and Lake Winibigoshish Bands of Chippewa, including the Mille Lacs Band, entered into another treaty with the United States government.¹⁶³ Unlike the 1837, 1842, and 1854 treaties, the 1855 treaty did not reserve any hunting, fishing, and gathering rights on the ceded territory for the Indians. Article Two of the 1855 treaty established the boundaries of new reservations, including a reservation for the Mille Lacs Band within the 1837 ceded territory.¹⁶⁴

Perhaps the most significant article of the 1855 treaty is Article One which provides in part: "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they

158. Treaty with the Chippewa, Sept. 30, 1854, U.S.-Chippewa, 10 Stat. 1109, reprinted in INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, TREATIES & AGREEMENTS OF THE CHIPPEWA INDIANS, 78-82 (1974) ("1854 Treaty").

159. Nelson, *supra* note 35, at 386 (citing United States v. Bouchard, 464 F. Supp. 1316, 1370-71 (W.D. Wis. 1978)).

160. Compare 1837 Treaty, *supra* note 4, at 67 and 1842 Treaty, *supra* note 148, at 73 with 1854 Treaty, *supra* note 158, at 78. See also State v. Gurnoe, 192 N.W.2d 892, 901 (Wis. 1971) (finding that the Indians had a right to fish on Lake Superior, since they would have assumed when they signed the 1854 treaty that "the right to fish" was not limited to the waters on the reservation).

161. See 1854 Treaty, *supra* note 158, at 78-82.

162. See Nelson, *supra* note 35, at 386. See also 1854 Treaty, *supra* note 158, at 78-82.

163. Treaty with the Chippewa, Feb. 22, 1855, U.S.-Chippewa, 10 Stat. 1165, reprinted in INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, TREATIES & AGREEMENTS OF THE CHIPPEWA INDIANS, 83-84 (1974) ("1855 Treaty").

164. 1855 Treaty, *supra* note 163, at 83-84.

may now have in, and to any other lands in the Territory of Minnesota or elsewhere."¹⁶⁵

F. Judicial Interpretation of Rights Granted Under the Chippewa Treaties

The question of whether the hunting, fishing, and gathering rights reserved in the 1837 and 1842 treaties were terminated by the 1850 removal order or the 1854 treaty was resolved by the Seventh Circuit Court of Appeals in *Lac Courte Oreilles Band of Chippewa v. Voigt*.¹⁶⁶ The *Voigt* court concluded that the guarantees reserved in the 1837 and 1842 treaties remained valid and enforceable.¹⁶⁷

First, the court found that the 1850 removal order was illegal¹⁶⁸ because Congress had plenary power over Indian affairs and the President could not exceed the power delegated to him by Congress by use of an executive order.¹⁶⁹ The court held that President Taylor's authority to remove the Indians was limited by Congress's plenary power¹⁷⁰ and by the Indians' own understanding of the treaty's terms.¹⁷¹ The court based this decision on the special canons of construction that require courts to consider the Indians' understanding of the treaty.¹⁷²

On the basis of treaty construction, the court found that the tribe believed that removal from the ceded territories would occur only if the tribe misbehaved by causing hostilities with the settlers.¹⁷³ Thus, because the court did not find any evidence indicating that the Indians had actually misbehaved, the removal order was held to be illegal.¹⁷⁴

Second, the court found that the off-reservation hunting, fishing, and gathering rights reserved in the 1837 and 1842 treaties were not

165. *Id.* at 83. This article was used by the State to support the claim that the hunting, fishing, and gathering rights granted to the Mille Lacs Band in the 1837 treaty were terminated. See generally Defendant's Memorandum in Support of Cross-Motion for Summary Judgment and in Response to Plaintiff's 2nd & 3rd Partial Summary Judgment Motions, at 9, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990) ("Defendant's Cross-Motion").

166. 700 F.2d 341 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983). The Wisconsin Band of Lake Superior Chippewa were not signatories to the 1855 treaty, therefore that treaty was not at issue in the *Voigt* case. Defendant's Cross-Motion, *supra* note 165, at 9 n.4.

167. *Voigt*, 700 F.2d 341 at 365 (concluding that to determine the validity of the 1850 removal order required a finding of whether the Indian tribe members misbehaved).

168. *Id.* at 362.

169. Nelson, *supra* note 35, at 387 (citing 700 F.2d at 361).

170. *Voigt*, 700 F.2d at 361.

171. *Id.* at 351.

172. See *supra* part II.B for a discussion of these special canons of construction.

173. *Voigt*, 700 F.2d at 361.

174. *Id.* at 362.

terminated by the 1854 treaty.¹⁷⁵ The *Voigt* court “reasoned that although Article Eleven [of the 1854 treaty] explicitly reserved these rights for Indians living in the 1854 ceded territories, the failure to reserve the rights for Indians living in the 1837 and 1842 ceded territories were not terminated, because the evidence was ambiguous at best.”¹⁷⁶

The *Voigt* court found that the Indians had not understood at the time of the 1854 treaty negotiations that they were terminating their hunting, fishing, and gathering rights in exchange for the reservations.¹⁷⁷ Consequently, all Indians subject to the 1837 and 1842 treaties maintained their reserved rights to hunt, fish, and gather.¹⁷⁸

VI. CURRENT CONTROVERSY OVER THE TREATY OF 1837

The Treaty of 1837 included territory covering parts of what is presently twelve counties in east-central Minnesota.¹⁷⁹ This area includes Lake Mille Lacs, a popular sport fishing destination.¹⁸⁰ The Mille Lacs Band of Chippewa is currently defending the rights retained under Article Five of the 1837 treaty. This Article expressly preserves the Band’s right to hunt, fish, and gather wild rice in these twelve counties without interference from the State.¹⁸¹ The Band contends that these reserved rights include the netting and spearing of game fish during spawning, acts that are illegal under Minnesota law.¹⁸²

In 1990, the Band sued the Minnesota Department of Natural Resources (“DNR”) to prevent enforcement of state fish and game regulations against Band members in the twelve counties.¹⁸³ To avoid litigation, the DNR and the Band agreed to a compromise creating a tribal fishing zone in 4.5% of Lake Mille Lacs where the Indians could

175. *Id.* at 364.

176. Nelson, *supra* note 35, at 387.

177. *Id.* at 387 n.51 (citing 700 F.2d at 363).

178. *Voigt*, 700 F.2d at 365.

179. The territory ceded by the Chippewa tribes in the 1837 treaty consisted of an area south and southeast of the Mille Lacs Reservation and includes part or all of Anoka, Aitkin, Crow Wing, Kanebec, Isanti, Morrison, Mille Lacs, Pine, Benton, Sherburne, and Chisago counties and other land. United States Complaint in Intervention at 2, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4–90–605 (D. Minn. Aug. 13, 1990).

180. Pat Doyle, *U.S. Seeks to Join Lawsuit to Back Indians on Treaty*, STARTRIB. (Mpls.), Sept. 3, 1993, at 16A (noting that Lake Mille Lacs is the “most popular destination for Twin Cities sport anglers”).

181. Complaint at 10, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4–90–605 (D. Minn. Aug. 13, 1990).

182. *Id.* See also MINN. STAT. chapters 97A, 97B, 97C (1992 & Supp. 1993) (regulating sport hunting and fishing in Minnesota).

183. Complaint, *supra* note 181, at 4. See also Pat Doyle, *supra* note 180, at 16A. See generally MINN. STAT. chapters 97A, 97B, 97C (1992 & Supp. 1993).

net or spear fish.¹⁸⁴ The DNR also agreed to provide the Band with 7500 acres of public land, up to \$10 million, and other concessions.¹⁸⁵

In order to prevail, the proposed settlement required the approval of the Minnesota Legislature and the concurrence of the Band.¹⁸⁶ However, the bill was defeated twice in the Legislature and has been said to have been the victim of legislative politics, divided leadership, and racism.¹⁸⁷ This legislative rejection led to the Band's decision to file suit against the State in federal court. The Band's objective was a judicial solution regarding the enforcement of treaty rights for off-reservation hunting and fishing in the ceded territory.¹⁸⁸

Two days after the treaty settlement was rejected, the Minnesota Legislature appropriated \$1 million to underwrite the initial costs of defending the Band's lawsuit.¹⁸⁹ The State, however, appeared to be underestimating the cost of litigating this issue given that the State of Wisconsin expended \$12 million and fourteen years litigating similar claims by other bands under the same treaty.¹⁹⁰

The Legislature's failure to approve the treaty settlement resulted in significant consequences, both current and future. First, if successful at trial, the Band could be awarded the right to take up to fifty percent of the fish in Lake Mille Lacs and the surrounding ceded territories.¹⁹¹ In a similar treaty dispute, a Wisconsin tribe won the right to take up to fifty percent of the fish in the northern third of the state of Wisconsin.¹⁹²

184. Doyle, *supra* note 180, at 16A.

185. *Id.*

186. See generally Robert Whereatt, *supra* note 1, at 1B.

187. *Id.*

188. Complaint, *supra* note 181, at 9-10.

189. Mordecai Specktor, *State Will Waste Millions in Vain Fight to Squelch Treaty Rights*, STARTRIB. (Mpls.), May 31, 1993, at 11A.

190. *Id.* See *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 760 F.2d 177 (7th Cir. 1985); *Lac Courte Oreilles Band of Chippewa v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983); *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 758 F. Supp. 1262 (W.D. Wis. 1991); *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 749 F. Supp. 913 (W.D. Wis. 1990); *Lac Courte Oreilles Band of Chippewa v. Wisconsin* 740 F. Supp. 1400 (W.D. Wis. 1990); *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 707 F. Supp. 1034 (W.D. Wis. 1989); *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 686 F. Supp. 226 (W.D. Wis. 1988); *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 668 F. Supp. 1233 (W.D. Wis. 1987); *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 653 F. Supp. 1420 (W.D. Wis. 1987).

191. The district court could follow a similar action taken by the court in *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 740 F. Supp. 1400 (W.D. Wis. 1990), which relied on the holding in *Washington v. Washington Commercial Fishing Passenger Vessel Association*, 443 U.S. 658 (1979). See 740 F. Supp. at 1417-18. The *Washington* Court held that the Indians were entitled to a fifty percent share of the harvestable run of fish. 443 U.S. at 686-88.

192. *Lac Courte Oreilles*, 740 F. Supp. at 1426.

Second, the Legislature's failure to approve the settlement resulted in the intervention of the United States Justice Department.¹⁹³ This time the Justice Department assumed "a far more active role than it played in the fishing and hunting dispute involving the same 1837 treaty in Wisconsin."¹⁹⁴ In *Lac Courte Oreilles Band of Chippewa v. Voigt*,¹⁹⁵ "the federal government merely filed a brief supporting the Wisconsin Chippewa when their court victory was appealed, but the Justice Department had not joined forces with the Chippewa during the earlier trial."¹⁹⁶

Because the federal government acts as trustee for Indian tribes,¹⁹⁷ the United States argued that the federal government had a congressionally imposed responsibility to protect the interests of Indian tribes.¹⁹⁸ Consequently, the Justice Department joined the Band in the suit against the State because it believed the dispute involved issues vital to the Band as well as Indian interests throughout the United States.¹⁹⁹

However, federal intervention on the side of the Band did not occur without protest by the State.²⁰⁰ The State urged the court to reject the Justice Department's request for intervention, arguing that the federal government has been inconsistent on the treaty issue.²⁰¹ The state maintained that "now, because the current administration . . . has a different view . . . it seems they are saying, '[w]e no longer have to defend what has historically been our Indian policy.'" ²⁰² The state contended that over the years the federal government embraced policies that nullified the Band's claims.²⁰³

Nevertheless, the State's argument was defeated by counter arguments by the Justice Department and the Band. The Band argued that "the federal government shouldn't be bound by any earlier federal pol-

193. United States' Notice of Motion and Motion to Intervene as Plaintiff, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990).

194. Doyle, *supra* note 180, at 16A.

195. 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983).

196. Doyle, *supra* note 180, at 16A. "[O]ne Indian official who has followed the Wisconsin and Minnesota cases said the Clinton Administration appears to be more willing than the Reagan and Bush administrations to side with Indians in such disputes." *Id.*

197. See *supra* part III.A.2.

198. Pat Doyle, *Attorneys Spar Over U.S. Policy on Tribal Rights; Government Bids to Intervene in Mille Lacs Fishing Case*, STARTRIB. (Mpls.), Oct. 20, 1993, at 1B.

199. Doyle, *supra* note 180, at 16A.

200. See Defendant's Reply Memorandum in Opposition to United States Motion to Intervene, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990).

201. Doyle, *supra* note 198, at 1B.

202. *Id.* (quoting Michelle Beeman, Minnesota Assistant Attorney General defending the State).

203. *Id.* See *supra* part IV (discussing the evolution of Federal Indian policy).

icies that subjected Indian tribes to state fish and game laws."²⁰⁴ In addition, the Band maintained that hunting and fishing laws have changed in the last fifty years and the Mille Lacs dispute should be based on current law.²⁰⁵ The motion to intervene was eventually granted and the Justice Department was joined as a party to the lawsuit.²⁰⁶

VII. THE INITIAL ARGUMENTS ON TERMINATION OF THE BAND'S RIGHTS AND AN ANALYSIS OF THEIR VIABILITY

The Band and the State have both raised numerous issues and posited various arguments in support of their respective positions. Initially, the State raised a number of primary arguments for termination of the Band's rights, including: 1) termination by reason of the 1850 removal order; 2) termination by reason of the 1855 treaty; 3) termination by reason of Federal Indian policy; and 4) termination for conservation purposes. Based on the facts of this case and prior outcomes in similar legal disputes regarding states' rights to regulate off-reservation hunting and fishing,²⁰⁷ one may predict how the court was likely to rule on this dispute.

A. Termination by Reason of 1850 Removal Order

First, the court was not likely to support the State's claim that the 1837 treaty was abrogated by the 1850 removal order.²⁰⁸ The State's attempt to establish new facts in support of the argument that the removal order terminated off-reservation hunting and fishing guarantees in the 1837 treaty is astonishing given that the State of Wisconsin failed to find any such facts during the seventeen years that Wisconsin made an identical, and unsuccessful, argument.²⁰⁹

Both the district and appellate court in *Lac Courte Oreilles Band of Chippewa v. Voigt*²¹⁰ found that the 1850 removal order by President Taylor was illegal and did not terminate any rights guaranteed to the Chippewa under the 1837 treaty.²¹¹ Those courts found that under the special canons of construction,²¹² the Indians involved in the 1837

204. Doyle, *supra* note 198, at 1B (quoting Marc Slonim, a Band attorney).

205. *Id.*

206. Order for Intervention, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990).

207. See, e.g., *Lac Courte Oreilles Band of Chippewa v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983); *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 668 F. Supp. 1233 (W.D. Wis. 1987).

208. Defendant's Answer to United States' Complaint, at 2-4, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990).

209. *Voigt*, 700 F.2d at 362. See Specktor, *supra* note 189, at 11A.

210. 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983).

211. *Id.* at 362.

212. See *supra* part II.B (discussing the special canons of construction).

and 1842 treaties understood that their off-reservation hunting and fishing rights were reserved so long as they maintained good behavior.²¹³ While not binding precedent, the court was likely to give these decisions strong consideration in making a determination on this argument.

In addition to these prior decisions on the validity of the removal order, the historical record alone supported a finding that the removal order did not terminate the rights reserved in the 1837 treaty. To that end, the Band contended that the 1850 removal order was never applied to the Mille Lacs Band, was abandoned in practice, and was nullified by later treaties that reserved to the Chippewas "permanent homes" in the territories ceded in the 1837 treaty.²¹⁴

Furthermore, in *Mole Lake Band v. United States*,²¹⁵ a decision addressing the issue of whether or not the 1850 removal order was valid, "the United States stated that 'in its administrative interpretations' of the effect of the 1850 Order 'the United States never considered that the Indian rights were terminated thereby.'"²¹⁶

B. Termination by Reason of 1855 Treaty

The court was also not likely to uphold the State's argument that the treaty of 1855²¹⁷ terminated the Band's rights to hunt, fish, and gather on the ceded territory under the 1837 treaty.²¹⁸ The State's argument was invalid on the basis of the application of the canons of construction used to interpret Indian treaties. These canons require the court to interpret the treaty of 1855 as the Chippewa Indians would have understood the treaty at the time the treaty was negotiated.²¹⁹

These canons mandate that the court interpret the 1855 treaty so as not to terminate any hunting, fishing, or gathering rights guaranteed to the Band in the 1837 treaty. This conclusion is based on two factors. One, there was no explicit statement in the treaty of 1855 that terminated the hunting, fishing, and gathering rights of the Chippewa in

213. United States Response to Defendant State's Memorandum in Support of Cross-Motion for Summary Judgment at 3, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990).

214. Plaintiffs' Memorandum in Support of Partial Summary Judgment Dismissing ICCA and Indispensable Party Defenses at 8, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990).

215. 139 F. Supp. 938 (Ct. Cl.), *cert. denied*, 352 U.S. 982 (1956).

216. See Plaintiffs' Response to Briefs Filed in Opposition to United States' Motion to Intervene at 5, *Mille Lacs Band of Chippewa v. Minnesota*, Civ. No. 4-90-605 (D. Minn. Aug. 13, 1990).

217. Defendant's Answer, *supra* note 208, at 4-5.

218. *Id.*

219. See *supra* part II.B.

the 1837 ceded territory.²²⁰ Second, the Chippewa would not have likely agreed to the treaty of 1855 if they understood that the treaty would terminate these rights, as termination would have meant eliminating their primary means of survival.

C. Abrogation by Reason of Federal Indian Policy

Third, the State was unlikely to be successful in arguing that the 1837 treaty was abrogated by subsequent federal government accords and policies.²²¹ Public Law 280,²²² established to implement the federal government's policy of terminating treaty rights during the 1950s, is one example of subsequent federal response to Indian policy.

In spite of Public Law 280's perceived implementation of the federal policy of termination, the Act did not, in fact, achieve this goal. The Act expressly provides that nothing "shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."²²³ This provision essentially leaves the State of Minnesota, as one of the few states to have adopted Public Law 280, in the same position with regard to treaty hunting and fishing rights as the State occupied in the absence of Public Law 280.

Moreover, the federal government is reluctant to abrogate Indian treaties to settle legal disputes.²²⁴ However, regardless of the current status of Federal Indian policy, the main consideration by the court should be the fact that this policy is constantly in flux.²²⁵ In fact, the only constant with regard to Federal Indian policy is the fact that the policy is continually changing.²²⁶ Therefore, the State's claim that its arguments are consistent with Federal Indian policy lacked merit due to the fact that the policy itself has been inconsistent²²⁷

220. *Lac Courte Oreilles Band of Chippewa v. Voigt*, 700 F.2d 341, 365 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983) (stating that the extinguishment of treaty-recognized rights by subsequent Congressional acts will be found only if it is clear that such termination was intended).

221. Defendant's Answer, *supra* note 208, at 9. "State Defendants allege that they have acted in reliance on long standing policies and pronouncements of the United States government in both its removal policy, legislation and its statements on extinguishment of rights under the 1837 Treaty and later treaties with the Chippewa Indians." *Id.*

222. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 589 (1953) (codified at 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1988)).

223. *Id.*

224. Richard A. Finnigan, Comment, *Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study*, 51 WASH. L. REV. 61, 94 n.177 (1975) (listing several unsuccessful Congressional attempts to abrogate treaty fishing rights).

225. See *supra* part IV (describing evolution of Federal Indian policy).

226. *Id.*

227. *Id.*

D. Termination for Conservation Purposes

Even if the Band were to convince the court that neither the 1837 treaty nor the hunting, fishing, and gathering rights guaranteed under that treaty were terminated, the Band would then have to overcome the State's argument that a state may regulate the off-reservation hunting and fishing of the tribe as a conservation measure, regardless of any Indian treaty rights.²²⁸ As noted regarding the state's ability to regulate a tribe's exercise of off-reservation rights, the Supreme Court has held that such regulation is permitted "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."²²⁹

In a later decision,²³⁰ the Supreme Court elaborated and held that in off-reservation cases "the appropriate standards requirement means that the state must demonstrate that its regulation is a reasonable and necessary conservation measure and that its application to the Indian is necessary in the interest of conservation."²³¹

The State of Minnesota will likely argue that regulations prohibiting gill netting and fish spearing should apply, as conservation measures, to the Band's activities on the ceded territory of the 1837 treaty. However, the State is unlikely to successfully satisfy the narrow exception that permits state regulation of off-reservation treaty rights based on the facts of this case and a prior court ruling on similar facts.²³²

Since netting and fish spearing are cultural and religious traditions that are unique to the Indians,²³³ any state regulation banning or prohibiting these activities would likely be viewed by the court as discriminatory.²³⁴ As a result, the state regulation would not satisfy the standard established to permit interference with Indian treaty rights. Furthermore, this was the court's finding in the Wisconsin dispute in-

228. Complaint, *supra* note 181, at 5.

229. *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398, *reh'g denied*, 393 U.S. 898 (1968).

230. *Antoine v. Washington*, 420 U.S. 194 (1975).

231. *Id.* at 207 (holding that the Supremacy Clause precluded application of State game laws to Indians hunting in an area ceded to the United States by an agreement executed by the federal government and the Indian tribe).

232. *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 668 F. Supp. 1233 (W.D. Wis. 1987).

233. See Complaint, *supra* note 181, at 4-5. See also Robert Whereatt, *House Rejects Mille Lacs Plan; Chippewa to Take Case to Court*, STARTRIB. (Mpls.), May 4, 1993, at 1A.

234. See *Department of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 48 (1973) (finding a state regulation against Indians to be discriminatory because "all Indian net fishing is barred and only hook-and-line fishing, entirely pre-empted by non-Indians, is allowed").

volving the 1837 treaty and state fishing regulations similar to those regulations Minnesota seeks to enforce against the Band.²³⁵

In addition, the State is likely to have difficulty convincing the court that enforcement of fishing regulations against the Band is "necessary," given the fact that the Band is a member of the Great Lakes Indian Fish and Wildlife Commission.²³⁶ This commission works closely with other natural resource agencies to conserve fish resources and restock the lakes.²³⁷ The Band's involvement in this conservation effort renders any suggestion that Indian people are not competent to manage natural resources nothing but racism.²³⁸ Consequently, the State is not likely to be successful in obtaining judicial permission for regulation of the Indians' off-reservation fishing, hunting and gathering activities.

VIII. RECENT COURT HOLDING

A. Background

On August 24, 1994, the U.S. District Court for Minnesota ruled on the issues involved in Phase I of the *Mille Lacs Band of Chippewa v. Minnesota*.²³⁹ The court and the parties had previously determined in March 1991 that this dispute should be resolved by bifurcating the matter.²⁴⁰ The court determined that the primary issues to resolve in Phase I were: 1) whether the 1837 treaty privilege that granted the Band the right to hunt, fish and gather wild rice on the ceded territory continued to exist; 2) whether this privilege extended to privately owned lands; and 3) the general nature of the treaty rights guaranteed by the privilege.²⁴¹ If the court found that the privilege continued to exist, then the parties would proceed to Phase II. The two main issues reserved for Phase II were resource allocation issues and the validity of particular regulatory measures affecting the exercise of the guaranteed privilege.²⁴²

The court asserted that the legal issues involved in Phase I required the application of the special canons of construction used for inter-

235. *Lac Courte Oreilles Band of Chippewa*, 668 F. Supp. at 1237 (stating that a facially neutral state regulation, applied in a nondiscriminatory manner, may still discriminate against tribal rights).

236. Priscilla Buffalohead, *State Should Do Right By Indians*, STARTRIB. (Mpls.), May 15, 1993, at 13A.

237. *Id.*

238. *Id.*

239. *Mille Lacs Band of Chippewa v. Minnesota*, — F. Supp. —, 1994 U.S. Dist. LEXIS 11901 (D. Minn. Aug. 24, 1994).

240. *Id.* at *7.

241. *Id.*

242. *Id.* Although the current opinion did not directly address issues reserved for Phase II, the court did, however, take the opportunity to clearly establish the legal standards to be applied in Phase II. *Id.* at *174-77.

preting Indian treaties.²⁴³ The court also clarified that it would consider the Seventh Circuit holding in *Lac Courte Oreilles Band of Chippewa v. Voigt*²⁴⁴ as "convincing authority"²⁴⁵ and stated that it was a "significant precedent for key issues in the case."²⁴⁶

B. Existence of the 1837 Privilege

With regard to the first issue in Phase I, the court held that the 1837 privilege granted to the Band did, in fact, continue to exist.²⁴⁷ The court based this holding on several findings of fact.

First, the court found that the Band did not consent to removal from the ceded territory in the 1837 treaty.²⁴⁸ This finding was based on the fact that "[i]f removal had been intended, then it would have been a topic of discussion during the treaty council, and the treaty would have included provisions for moving the Chippewa similar to those in other treaties with removal clauses."²⁴⁹

Second, the court found that the Chippewa had not understood that the 1837 treaty gave the President unrestricted discretion to revoke the Indians' privilege to hunt, fish, and gather on the ceded territory, as provided in Article Five of the treaty.²⁵⁰ More specifically, the Chippewa did not understand the phrase "during the pleasure of the President," that was included in Article Five, as a "finite limitation on their continued way of life in the ceded territory."²⁵¹ In addition, the court found further evidence that the Chippewa did not understand this phrase to mean the President could revoke their privilege at anytime for any reason by the fact that there was no discussion of this subject during the negotiations.²⁵²

243. *Id.* at *115–16 ("The first rule is that Indian treaties must be construed as the Indians understood them A second rule of construction requires any ambiguous term in a treaty to be resolved in favor of the Indians Together these canons of construction require a liberal interpretation in favor of the Indians.") (citing *Jones v. Meehan*, 175 U.S. 1, 4–5 (1899); *Winters v. United States*, 207 U.S. 564, 576–77 (1908); *Lac Courte Oreilles Band of Chippewa v. Voigt*, 700 F.2d 341, 350 (7th Cir. 1983)). For further discussion of these canons see *supra* part II.B.

244. 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983).

245. *Mille Lacs Band*, 1994 U.S. Dist. LEXIS 11901 at *119.

246. *Id.* at *118. The court rejected the defendant's arguments that it should not apply the holding of *Lac Courte Oreilles Band of Chippewa v. Voigt*, 700 F.2d 341 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983) because it was wrongly decided. *Id.*

247. *Id.* at *183. The court rejected the arguments presented by the State, counties and landowners that the privilege reserved in the 1837 treaty was "temporary and later extinguished." *Id.* at *118.

248. *Id.* at *35, *124.

249. *Id.* at *31, *124.

250. *Mille Lacs Band*, 1994 U.S. Dist. LEXIS 11901 at *35, *134–35.

251. *Id.* at *29.

252. *Id.* at *30. "The Chippewa who had persistently demanded to continue their way of life during the treaty negotiations certainly would have objected . . . if the literal

Finally, the court also relied on the *Lac Courte Oreilles Band of Chippewa v. Voigt*²⁵³ holding in determining that the President's discretion to revoke the privilege under Article Five was "restricted so long as the Indians behaved well and peacefully" ²⁵⁴ Based on the record, the court found that there was no evidence of misbehavior by the Chippewa that would warrant a revocation of their privilege.²⁵⁵

Third, the court found that the removal order issued by President Taylor in 1850²⁵⁶ did not extinguish the Band's privileges under the 1837 treaty.²⁵⁷ The court based this determination primarily on the finding that the removal order was outside the scope of the President's authority.²⁵⁸ The removal order was outside the President's authority because he had not received the consent of the Chippewa for their removal, as required by Congress.²⁵⁹ In addition, the court also gave consideration to the fact that the removal order was never enforced against the Band.²⁶⁰

Fourth, the court found that the Band did not relinquish its 1837 privilege to hunt, fish, and gather in the 1855 treaty with the U.S. government.²⁶¹ The court rejected the argument that the 1837 privilege was extinguished under language in Article One of the 1855 treaty, which stated that the "Indians do further fully and entirely relinquish and convey to the United States, any and all right, title or interest, of whatsoever nature the same may be, which they may now have in, and to, any other lands in the territory of Minnesota or elsewhere."²⁶² The

meaning of the phrase had been conveyed." *Id.* Furthermore, the court maintained that "[e]ven people fluent in twentieth century English . . . might not understand the legal meaning of 'at the pleasure of the President.'" *Id.*

253. 700 F.2d 341, 361 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983).

254. *Mille Lacs Band*, 1994 U.S. Dist. LEXIS 11901 at *132-33.

255. *Id.* at *135.

256. *See supra* part V.C. discussing this order.

257. *Mille Lacs Band*, 1994 U.S. Dist. LEXIS 11901 at *76. Applying the test established in *Goldwater v. Carter*, 444 U.S. 996 (1979), the court rejected the argument that the court did not have jurisdiction to review the 1850 Removal Order on the grounds that it presented a political question. *Id.* at *136-39. The court further noted that the underlying motivation behind the removal effort was primarily economic. *Id.* at *49-50, 135. "If Wisconsin Chippewa were removed to Minnesota, then Minnesota traders would be more likely to benefit from the annuity payments made to the Indians" *Id.* at *49.

258. *Id.* at *125, *135-36. The court also noted the well-established rule that "[t]he Constitution does not provide the President with the power to remove Indian tribes or to abrogate rights guaranteed under treaties." *Id.* at *121-22. For further discussion of the federal government's regulatory powers over treaty rights see *supra* part III.A.

259. *Id.* at *122 (citing the 1830 Removal Act § 2, 4 Stat. 411, 411-12).

260. *Id.* at *142-43, *76. The court noted that the removal effort was focused solely on moving six Wisconsin bands to Minnesota and not on the removal of the Mille Lacs Band. *Id.* at *70.

261. *Id.* at *156, *103.

262. *Mille Lacs Band*, 1994 U.S. Dist. LEXIS 11901 at *143-44.

court maintained that pursuant to the canons of construction, the absence of any reference in the 1855 treaty to hunting, fishing, and gathering rights required the court to consider what the Chippewa understood and intended the 1855 treaty to mean.²⁶³ The court held that based on the "circumstances and legislative history of the 1855 treaty," neither the Chippewa nor Congress intended or understood the 1855 treaty to relinquish the 1837 privilege.²⁶⁴

C. *No Extension of the Privilege to Private Lands*

Regarding the second principal issue to be determined in Phase I, the court held that the 1837 hunting, fishing, and gathering rights did not extend to privately owned lands,²⁶⁵ because no right of access was included in the 1837 privilege.²⁶⁶ However, the court was also careful to note that the Band was not actually seeking the ability to exercise its 1837 rights on private property in this action.²⁶⁷

D. *General Nature of the Treaty Rights*

The court held that the Band's hunting, fishing, and gathering rights were not limited with regard to the type of resources harvested or regarding the time, place, or manner of exercise of the guaranteed 1837 privilege.²⁶⁸ In addition, the court found that the privilege also included the right to harvest the resources for commercial purposes.²⁶⁹ The court based this finding on evidence that established that the Chippewa understood the phrase "hunting, fishing and gathering the wild rice" to mean "living off the land," since "[i]n 1837 the Chippewa used all of their surrounding natural resources to survive."²⁷⁰

263. *Id.* at *145-47.

264. *Id.* at *146-49. The court further noted that Band representatives at the 1855 treaty negotiations would not have knowingly given up the guaranteed privilege without discussion, especially considering the fact that they "would have starved if they were confined to the boundaries of their reservation." *Id.* at *147.

265. The court stated "privately owned lands do not include public lands formerly in private ownership or private lands open to public hunting, fishing, and gathering." *Id.* at *166 (citing *Lac Courte Oreilles Band of Chippewa v. Wisconsin*, 653 F. Supp. 1420, 1432 (W.D. Wis. 1987)).

266. *Id.* at *165-66.

267. *Mille Lacs Band*, 1994 U.S. Dist. LEXIS 11901 at *166.

268. *Id.* at *172-74. The court rejected the argument that this issue should not be addressed because the phrase "the general nature of the rights" had not been defined in the bifurcation order. *Id.* at *168.

269. *Id.* at *174.

270. *Id.* at *172-73.

E. Denial of Interlocutory Appeal

Finally, the court rejected the State's request that a decision in favor of the Band be certified for interlocutory appeal²⁷¹ under 28 U.S.C. § 1292(b).²⁷² The court held the Phase I issues were not novel or complex, and the canons of construction and applicable law were well-established.²⁷³ Furthermore, the court maintained that there was "no reason to believe that an immediate appeal would materially advance the ultimate termination of the litigation."²⁷⁴ Rather, such an appeal could result in a long delay.²⁷⁵

IX. CONCLUSION

The current dispute between the Mille Lacs Band of Chippewa and the State of Minnesota is one more embarrassing and disgraceful chapter in this country's history of relations with the Indian nations. After inducing Indian tribes to give up their land in exchange for treaty rights and life on reservations, one would think that the very least state governments could do is adhere to the promises guaranteed by the United States government.

Unfortunately, this is typically not the case. Instead, many states, including Minnesota, continue to refuse to accept that the United States Constitution preempts state authority over treaties between the federal government and Indian nations.²⁷⁶ Although the dispute is as yet unresolved, a victory for the Mille Lacs Band should send a strong message to the State of Minnesota, and other states, that federal courts will no longer tolerate attempts to destroy Indian treaty rights.

Catherine M. Ovsak

271. "The Court of Appeals may choose to hear an appeal from an order that is not otherwise appealable if the district court certifies that it 'involves a controlling question of law as to which there is substantial ground for difference of opinion' and that an 'immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Id.* at *179 (citing 28 U.S.C. § 1292 (b) (1988)).

272. *Mille Lacs Band*, 1994 U.S. Dist. LEXIS 11901 at *177-81.

273. *Id.* at *180.

274. *Id.*

275. *Id.* at *181. The court referred to the fact that prior settlement efforts had failed between the parties and there was a strong likelihood of the defendants to "also seek a hearing by the Supreme Court if unsuccessful after any interlocutory appeal." *Id.*

276. U.S. CONST. art. VI, cl. 2.